ACTIONS AGAINST THE PROPERTY OF SOVEREIGNS

COURTS and text-writers have long been in agreement that a sovereign cannot be sued in his own courts without his consent. It has also been generally accepted as a principle of international law that courts will not entertain a suit against a foreign sovereign if objection to the jurisdiction is made. Out of these two doctrines the rule has been developed that the public property of a sovereign falls within his general immunity. This last rule has become of great importance since governments in recent years have widely extended the scope of their ownership and control.

The immunity accorded the property of sovereigns has not been limited to actions which have as their object an adjudication of title that shall be binding upon the "whole world." The immunity has also attached to actions which attempt to reach simply the interest which particular defendants have in property. The immunity, therefore, covers both actions *in rem*, as that term is used in admiralty, and actions which are sometimes called actions *in rem*, but are perhaps better described as actions *quasi in rem*.

There are some early obscure precedents referred to by Bynkershoek, but the first case of any significance in this subject is *The Exchange*.[1] Marshall, speaking for a unanimous court, refused to take jurisdiction of a libel against an armed ship which was part of the French naval forces. The basis of his decision was the international comity supposed to exist between nations, according to which each sovereign waived a part of his territorial jurisdiction in favor of every other sovereign. The reason given for this custom was the mutual benefit accruing to the several sovereigns from the implied agreement to respect one another's dignity and independence. The waiver of jurisdiction was said to be made in favor of the person of the sovereign, his ambassador, his armies passing by consent through another country, and his armed ships coming into a friendly port.

[1] 7 Cranch (U. S.) 116 (1812).

Marshall's reasoning was fully indorsed by the English Court of Appeals in *The Parlement Belge*.[2] The case was a libel to recover damages for a collision brought against a ship belonging to the King of Belgium and used not only in carrying the mails, but also in transporting passengers and freight for hire. During the half century since *The Exchange*[3] there had been a great growth in the body of the law. Whereas Marshall could not refer to a single opinion to support his conclusions, Lord Esher was able to state that, "exemption from interference by any process of any Court of some property of every sovereign is admitted to be a part of the law of nations." He decided that the principle upon which this exemption rested was the implied agreement among states to respect one another's absolute independence of every sovereign authority. He held that this principle was applicable to all the property of any state destined to public use. An additional ground of decision was that seizure of property by admiralty process indirectly impleads the owner of the property and, as said by the court,

"The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court."[4]

The first case to consider carefully the exemption of property of the local sovereign was *Briggs* v. *Light-Boats*.[5] Three vessels belonging to the United States and stated to be in their possession, and which had been built for use as floating government light-ships, were held not subject to statutory attachment proceedings in a state court. Judge Gray reasoned that a sovereign cannot be sued in his own courts without his consent, not because a sovereign cannot command himself, but because he must be free to perform his governmental functions. His property, likewise, must be free from court control because it is an instrument of government.[6]

[2] 5 P. D. 197 (1880). [3] *Supra*.

[4] American Courts of Admiralty would probably not accept Lord Esher's second conclusion. The American rule is that a collision gives to the party injured a right *in rem* in the offending ship without regard to personal responsibility, the ship itself being considered the wrongdoer. The Barnstable, 181 U. S. 464, 467 (1901).

[5] 11 Allen (Mass.) 157 (1865).

[6] Story, J., in United States *v.* Wilder, 3 Sumner (U. S.) 308 (1838), took the view that in cases of salvage or general average the argument *ab inconvenienti* in favor

The property of a republic must be presumed to be intended for the public purposes of government, and courts cannot pass judgment upon the comparative importance of the sovereign powers of the United States.

A few years later the United States Supreme Court held in *The Davis* [7] that cotton of the United States being shipped on a private vessel could be libeled for salvage services rendered in saving it. The court indicated that the reason for the exemption of property of the local sovereign was to "prevent any unseemly conflict between the court and the other departments of the government." Only property in the actual possession of some officer charged on behalf of the government with its control was held to be free from court process. The court cited as its only authority *Briggs* v. *Light-Boats*.[8] In that case at the time of the attachment all the vessels were still at the builder's wharf and one of them had not received any crew on board. It would therefore appear that this vessel was not in the government's possession within the meaning of *The Davis*.[9] Moreover, the Supreme Court, speaking through Justice Field in *The Siren*,[10] had previously in a strong *dictum* indorsed a different doctrine. The court then said:

"It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. . . .

"The same exemption from judicial process extends to the property of the United States, and for the same reasons."

The decision in *The Davis* [11] might have been reached on other grounds if the court had distinguished between property engaged, and property not engaged, in the public service.[12] Every con-

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of an action *in rem* against government property was stronger than that opposed to it. His *dictum* that such actions could be brought is out of line with the authorities.

[7] 10 Wall. (U. S.) 15 (1869).

[8] *Supra.*

[9] *Supra.*

[10] 7 Wall. (U. S.) 152 (1868).

[11] *Supra.*

[12] The explanation which Waite, C. J., in The Fidelity, 16 Blatch. (U. S.) 569 (1879), gave of the decision in The Davis was that the property libeled was not devoted to a public use. The cotton had been collected under the Abandoned and Captured Property Act and was being shipped to New York for sale so that the proceeds might go into the Treasury.

stitutional use of property must be conclusively presumed to be public, but government ownership, apart from active use in the business of government, should not necessarily impute to property a public character. In the enforcement of judgments against municipal corporations a distinction is commonly made between property owned for profit and charged with no public trusts or uses, which may be sold on execution; and property used for public purposes, such as hospitals, fire engines, waterworks, and the like, which is exempt from execution.[13] This distinction is applicable to cases against the property of sovereigns, and government use furnishes a more rational and less fortuitous test than government possession.

The English Privy Council has disregarded the rule laid down in *The Davis*.[14] *Young* v. *S. S. Scotia* [15] was a libel filed against a ship belonging to the Canadian government. It was argued that at the time of the libel the boat was still in the possession of the builders, but the Lord Chancellor said that the question of the possession of the Crown was immaterial.

In an earlier case involving the property of a foreign sovereign the English Court of Appeals did not even notice the question of possession. *Vavasseur* v. *Krupp* [16] was an action for infringement of patent rights, the plaintiff seeking an injunction to prevent the removal of certain shells owned by the Mikado of Japan and in the possession of commercial agents. The court refused to grant an injunction and James, L. J., refers to the plaintiff's action as "one of the boldest I have ever heard of as made in any Court in this country."

The Massachusetts court has taken the same position. In *Mason* v. *Intercolonial Railway*,[17] in an action by trustee process, trustees were summoned as having in their possession property of the defendant railway, which in turn belonged to the King of England. In holding there was no jurisdiction the opinion quoted from and relied on the leading cases of actions *in rem* against the property of a sovereign.

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[13] 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 992; 3 MCQUILLEN, MUNICIPAL CORPORATIONS, § 1160.

[14] *Supra.*

[15] [1903] A. C. 501.

[16] 9 Ch. D. 351 (1877).

[17] 197 Mass. 349 (1908).

Two cases of libel for salvage services arising in federal district courts, *Long* v. *The Tampico* [18] and *The Johnson Lighterage Co., No. 24*,[19] have followed *The Davis* [20] where the property proceeded against belonged to a foreign government. In the latter case the court declared the principle on which immunity is granted is the same whether it is the domestic or a foreign sovereign that is involved. The correctness of this statement needs examination.

It is evident from Marshall's opinion in *The Exchange* [21] that he regarded the various kinds of immunity accorded foreign sovereigns as matters of grace or comity. But in *United States* v. *Clarke* [22] Marshall stated it as a matter of "common right" that the United States could not be sued. In Lord Esher's time the immunity of foreign sovereigns and their property was recognized as a right, but this right was simply the outgrowth of international practice. It is reasonably clear, therefore, that the courts did not regard the immunity of foreign sovereigns as a mere matter of deduction from the well-settled immunity of the domestic sovereign. The immunity accorded, moreover, has different bounds in the two cases. In the immunity of the local state there can be found nothing analogous to the immunity given under certain circumstances to the private servants of a foreign ambassador.

It is said that the principle governing both cases is the same since immunity is granted out of respect for the "independence of sovereign authority." In so far as this phrase expresses the policy underlying the decisions, it merely cloaks the difference between them. In cases involving the local sovereign it represents the state's need for executive freedom from harassing litigation. In cases involving the foreign sovereign it indicates the desire to avoid international friction by substituting diplomatic negotiations for the decrees of local tribunals.

The decisions of the federal courts based on *The Davis* [23] must be considered *contra* to the current of authority in international law.[24] In view of the fact that the law has always favored salvage

[18] 16 Fed. 491 (1883).
[19] 231 Fed. 365 (1916).
[20] *Supra.*
[21] *Supra.*
[22] 8 Pet. (U. S.) 436 (1834).
[23] *Supra.*
[24] See the statement in HALL, INTERNATIONAL LAW, 7 ed., 211: "If in a question with respect to property coming before the courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state."

claims,[25] the way still lies open to the courts to restrict the authority of these cases to salvage claims. In *The Florence H.*,[26] however, Judge Learned Hand expressed the opinion that the same principles apply to every kind of action brought *in invitum* against a sovereign.

The question whether immunity attaches to the ship of a foreign sovereign used for trading purposes was at one time somewhat doubtful. Sir R. Phillimore in *The Charkieh*[27] advanced the view that no immunity would be granted a trading vessel. The case before him was a ship belonging to the Khedive of Egypt. Although the cases do not appear to have made any distinction between personal and governmental sovereigns, it might be urged that property of the former embarked in commercial enterprises was used for private ends, while property of a state engaged in commerce must ordinarily be regarded as vested with a public character.

In *The Parlement Belge*[28] Lord Esher decided that the immunity of a national ship is not lost because of its partial use for trading purposes. In *The Jassy*[29] the court refused to take jurisdiction of an action against a ship belonging to the Roumanian government and used in connection with the state railway. The ship which was held immune in *The Eolo*[30] was carrying a cargo of iron ore to be delivered to private consignees to be made up into war material for the Italian government.

The American cases have also failed to follow Sir R. Phillimore's *dictum*. In *Mason* v. *Intercolonial Railway*[31] the Massachusetts court refused to take jurisdiction of an action by trustee process summoning trustees who had in their possession property of a foreign sovereign. In *The Pampa*[32] a United States district court held exempt from arrest an Argentine naval transport employed

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[25] See BENEDICT, ADMIRALTY, 4 ed., § 224: "Salvage service is highly favored in law, in all commercial countries, from motives of clear public policy and a regard to the interests of commerce."

[26] 248 Fed. 1012 (1918).

[27] 4 L. R. A. & E. 59 (1873).

[28] *Supra.*

[29] [1906] P. D. 170.

[30] 2 Ir. 78 (1918).

[31] *Supra.*

[32] 245 Fed. 137 (1917).

in carrying a cargo of general merchandise belonging to private persons. The vessel was to carry on its return voyage material for the use of the Argentine Republic. In *The Attualita* [33] the ship at the time the libel was served was on her way under orders of the Italian government to load a cargo of grain and rails for Italy. No question was made of the public use of the vessel although she was refused immunity on other grounds.

The most recent case on this subject, *The Maipo*,[34] holds immune a Chilean naval transport which the government as the result of public bidding chartered to a private individual for commercial purposes. The court assumed that the foreign government may have retained possession of its ship through its naval captain and crew for the very purpose of keeping the vessel immune in foreign ports. This circumstance was not considered important. The result and effect of holding the vessel immune was treated as the determining factor in the decision. In this connection Judge Mayer said:

"These enterprises may, in some instances, be regarded (technically speaking) as commercial, but may, in substance, be of benefit to the people at large. Time is of vital importance to every ship, of whatever nationality, which sails the seas. . . . Whatever loss or inconvenience, if not safeguarded against, might thus result either to our people when dealing with foreign ships or to foreign peoples when dealing with us, is the price which the individual is paying for the ultimate benefit of his country."

Cases relating to property of the domestic sovereign are equally conclusive. The ship libeled in *Young* v. *S. S. Scotia* [35] was a ferry-boat in the Canadian government's railway system. The Lord Chancellor treated the property right of the Crown as conclusive of the court's lack of jurisdiction. In *The Florence H.*[36] Judge Learned Hand recognized the public character of a ship which at the time it was libeled was chartered to the Emergency Fleet Corporation and was engaged in loading a cargo of food for the French government. The arrangement between the Fleet Corporation and the French government was assumed to be "no other than the carriage of freight for hire."

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[33] 238 Fed. 909 (1916).
[34] 252 Fed. 627 (1918).
[35] *Supra.*
[36] *Supra.*

Courts could scarcely, consistently with the general principles which have guided them, refuse immunity to the ships of foreign nations used in trade. Sovereign authority would shrink to small proportions if not permitted to determine what uses of its property are public. To inquire into the use of property declared by a foreign sovereign to be public would be to flout the dignity of sovereignty which the courts have declared entitled to respect. In *The Parlement Belge*[37] the sovereign's statement covering the public use of his property was regarded as barring inquiry, and in *The Exchange*[38] the court refused to question the sovereign's statement as to title.

Certain recent English cases have made government use of private property the basis of immunity. *The Broadmayne*[39] was an action *in rem* for salvage services against a ship requisitioned by the English Crown. The requisitioning was a compulsory hiring which left title and possession in the owners. The Court of Appeal made an order forbidding the detention of the ship while under requisition. Swinfen Eady, L. J., speaks of the ship as, "in the service of the Crown, and as such exempt from process of arrest." Pickford, L. J., speaks of "the right of the Crown not to have its prerogative interfered with, and not to have its interest in any way deteriorated." Bankes, L. J., said,

"The vessel whilst the requisition lasts, is . . . *publicis usibus destinata*, and as such not liable to the claims or demands of private persons."

In this case the English court appears to go far toward adopting the principle enunciated by Judge Gray in *Briggs* v. *Light-Boats*,[40] the necessities of government. As he there said,

"[It] would endanger the performance of the public duties of the sovereign . . . to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury."

The case on this basis is a logical extension of previous doctrine. During the period that the state employs and controls private property, that property is in the service of the state and must be treated as assimilated with the public property of the state.

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[37] *Supra.*

[38] *Supra.*

[39] [1916] P. D. 64.

[40] 11 Allen (Mass.) 157, 162 (1865).

In *The Messicano* [41] Sir Samuel Evans, following the authority of *The Broadmayne* [42] without discussion, refused to allow the arrest of a private ship requisitioned by a foreign government under a hiring arrangement. *The Eolo* [43] presented similar facts and the ship was released. The chief point argued was whether the vessel had been requisitioned within the meaning of previous cases. On this issue O'Connor, M. R., said, "As I understand these authorities they govern the case of a ship sailing under the order of a sovereign State, for State purposes, and for a limited time."

The United States Circuit Court of Appeals upon similar facts reached a different result. In *The Attualita*,[44] the ship which was libelled had been requisitioned by the Italian Government, but remained in the custody and control of her owners. The court retained jurisdiction of the libel on the ground that the Italian government was not responsible "at law or in morals" for the acts of the libeled ship. The court overlooked the fact that when a foreign government requests the release of a ship from the process of a foreign court, it obligates itself "in morals," as fully as if it were the owner, to answer for the acts of the ship. The case, moreover, is *contra* to the *dictum* of Judge Hough in *The Athanasios*,[45] and the *dictum* of Judge Thompson in *The Luigi*.[46]

The system under which our government is operating the railroads is very similar to the status of requisitioned ships. The same features exist of government rental from private owners and of private management under government direction. President Wilson's proclamation of December 26, 1917, taking possession and control of rail and transportation systems, provided that, except with the prior written assent of the director of railroads, there should be no attachment levied on "any of the property used by any of said transportation systems in the conduct of their business as common carriers." Section 10 of the Act approved March 21, 1918, in which Congress regulated the operation of the transportation systems while under federal control, provided that "no process, mesne or final, shall be levied against any property under such Federal control." In any case involving proceed-

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[41] 32 T. L. R. 519 (1916).
[42] *Supra.*
[43] *Supra.*
[44] *Supra.*
[45] 228 Fed. 558 (1915).
[46] 230 Fed. 493 (1916).

ings against a ship or other property requisitioned for use by our government, these executive and legislative precedents touching the requirements of efficient administration are entitled to great weight.

When a sovereign comes into court as plaintiff, in so far as he seeks relief he is bound by the usual rules governing litigants. He may be required to give security for costs [47] and he may be met by defenses, set-offs or cross-bills [48] incident to the subject matter of the action. But the waiver of immunity is not held to extend to affirmative relief against the sovereign. The Supreme Court has held that the set-offs permitted by statute to be asserted against the United States do not allow any judgment to be rendered against the government, although it may be judicially determined that the government is indebted to the defendant.[49] Foreign sovereigns would probably be accorded the same immunity, for in their aspect as plaintiffs the same principles apply to all sovereigns alike.

In *South African Republic* v. *Compagnie Franco-Belge* [50] the English Court of Appeal held that a counterclaim based on a transaction independent of that sued on could not be asserted against a plaintiff sovereign. On the other hand, a federal district court held in *Kingdom of Roumania* v. *Guaranty Trust Co.*,[51] that a sovereign suing to recover a deposit could be interpleaded against his will by one whose claim arose independently of the original deposit. The American decision seems preferable. The courts may well regard themselves as open only to those who impliedly assent to having complete justice done with respect to the property sued for or the defendant proceeded against. As long as no liability beyond the bounds of the litigation is imposed on the sovereign, he cannot complain that his prerogative is interfered with.

A unique case in this subject is that of *Von Hellfeld* v. *Russian Government*,[52] decided in 1910 by the Prussian Court for the Determination of Jurisdictional Conflicts. Suit was originally brought

[47] Rothschild *v.* Queen of Portugal, 3 Y. & C. 594 (1839).

[48] Duke of Brunswick *v.* King of Hanover, 6 Beav. 1 (1844); United States *v.* Proileau 13 W. Rep. 1062 (1865).

[49] United States *v.* Eckford, 6 Wall. (U. S.) 484 (1867).

[50] [1898] 1 Ch. 190.

[51] 244 Fed. 195 (1917).

[52] Decision reported in 5 AM. JOUR. OF INT. LAW, 490 (1910).

by Russia in the German court at Kiao-chau, and judgment was rendered against Russia on a counterclaim asserted by the defendant. The case came before the Prussian court on the question whether execution against Russian property in Berlin could issue on this judgment. The court assumed that the Russian government had submitted itself to the jurisdiction of the Kiao-chau court for the purpose of deciding the counterclaim. It held, however, that this submission must be regarded as "limited to the judicial determination of the question of law at issue between the parties" and that it did not extend "to the judicial execution of any resulting judgment." The court said the fact was to be premised that a renunciation of sovereignty would take place only in a definite relation, and it pointed out that even in arbitration treaties nations make no provision for submission to the execution of the arbitral award.

The decision can hardly be questioned. Because a foreign sovereign consents to an adverse judgment, he does not thereby consent to indiscriminate seizure of his property to satisfy that judgment. In fact, Laurent,[53] who makes a distinction between a state's governmental acts (*actes de souveraineté*) and its private acts (*actes d'intérêt-privé*) and who urges that foreign states should be amenable to suit in the latter class of cases, declares that even after adverse judgment the state's property must be free from seizure. It would seem to follow from the views of this writer, although he does not discuss the point, that he would favor a wider immunity for suits against the property of foreign sovereigns than for suits directly against such sovereigns.

In spite of some early criticism the law to-day gives immunity to the property of a sovereign which is used for public purposes; and the wide functions of government are recognized in interpreting what is a public purpose. The distinction which in theory should be made between cases involving the domestic and cases involving a foreign sovereign has been so consistently glossed over that it can scarcely be said to exist as a living principle of law. The English courts have protected every interest which a sovereign may have in property. The American courts have not as yet given immunity to private property employed by a sovereign.

[53] See his DROIT CIVIL INTERNATIONAL, Paris (1880), vol. 3, 75–89.

There is, further, in our cases a limitation, the extent of which has not been settled, dependent upon the possession of the sovereign. The trend of recent decision, however, is probably toward a full recognition of the varied interests of government in property.

With a large part of the world's shipping now owned or requisitioned by sovereign nations, many maritime claims can not be liquidated except through the favor of government, through recourse to foreign courts, or through diplomatic exchanges. This situation is unsatisfactory and will probably require regulation by treaty. It is possible that the peace conference will provide new machinery. An elaborate scheme for an International Court of Appeal in Prize Cases was drawn up by the Hague Conference of 1907. A similar tribunal with either original or appellate jurisdiction might be erected to determine claims asserted in times of peace against ships of foreign sovereigns.

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